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**IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
THIRD APPELLATE DISTRICT**

(Glenn)

THE PEOPLE,

Plaintiff and Respondent,

v.

MARCELO RUBIO, JR.,

Defendant and Appellant.

C080311

(Super. Ct. No. 13NCR09625)

OPINION ON REHEARING

Defendant Marcelo Rubio, Jr., was convicted of multiple theft offenses and admitted four prior prison term enhancement allegations. Subsequent to sentencing, the trial court redesignated two of the prior convictions on which the prior prison term enhancements were based as misdemeanors. On appeal, defendant contended the trial court erred in denying his motion to be resentenced by striking the enhancements based on that redesignation of the prior convictions as misdemeanors.

In an unpublished opinion, we rejected defendant's claim that the trial court erred by denying his motion to be resentenced following the redesignation of his prior

convictions as misdemeanors and affirmed the judgment. (*People v. Rubio* (Sept. 27, 2016, C080311) [nonpub. opn.].) The Supreme Court granted his petition for review and deferred the matter pending consideration and disposition of a related issue in *People v. Valenzuela*, S232900, or pending further order of the court.

In July 2018, our Supreme Court issued *People v. Buycks* (2018) 5 Cal.5th 857 (*Buycks*), a consolidated decision in *Buycks*, *Valenzuela*, and *In re Guimar* (S238888), regarding the effect of Proposition 47 on felony-based enhancements. (*Buycks*, at p. 871.) The Supreme Court held that a successful Proposition 47 petitioner could subsequently challenge a felony-based enhancement based on a now reduced felony in certain circumstances. (*Buycks*, at p. 879.) The Supreme Court transferred the matter back to this court with directions to vacate our opinion and reconsider the cause in light of *Buycks*. We vacated our opinion on September 21, 2018. The parties have filed supplemental briefs.

After consideration of *Buycks*, we affirm the judgment without prejudice to the filing of a petition for writ of habeas corpus in the trial court seeking to strike defendant's 2000 prior prison term enhancement and contesting the validity of the 1990 and 1991 prison prior enhancements under the washout rule.

PROCEDURAL BACKGROUND¹

The People charged defendant with first degree residential burglary (Pen. Code, § 459),² conspiracy to commit a felony (§ 182, subd. (a)(5)), and misdemeanor possession of burglary tools (§ 466), and further alleged defendant had served four prior

¹ Although both parties detail the factual and procedural history of the underlying convictions, those details are largely irrelevant to any issue raised on appeal and are therefore not recounted here.

² Undesignated statutory references are to the Penal Code.

prison terms within the meaning of section 667.5, subdivision (b). The four prior prison terms were served for felony convictions of section 487.1 (case No. CM000457), sections 487 and 470 (case Nos. 00CR00024 and 00CR00009),³ section 273.5, subdivision (a) (case No. 04NCR01172), and Health and Safety Code section 11352 (case No. 23323). A jury found defendant guilty of first degree burglary and misdemeanor possession of burglary tools. Defendant admitted the prior prison term enhancement allegations. The trial court sentenced defendant to an aggregate term of 10 years in state prison, including an additional one-year term for each of the four prison term enhancements. This court affirmed defendant's convictions. (*People v. Rubio* (Oct. 24, 2014, C074476) [nonpub. opn.])

In January 2015, under Proposition 47 codified in section 1170.18 and in response to a petition from defendant, the trial court redesignated defendant's convictions for sections 487 (case No. 00CR00024) and 470 (case No. 00CR00009) as misdemeanors. Defendant then filed a petition in this case to relieve him from two of his prior prison term enhancement sentences. The People opposed defendant's petition and the trial court denied resentencing. Defendant separately filed a motion to amend the abstract of judgment to reduce his sentence by two years as a result of the redesignation in case Nos. 00CR00009 and 00CR00024. The trial court denied the motion for an amended abstract and defendant appealed. A request for a certificate of probable cause was denied.

On appeal, defendant argued the trial court erred in denying his motion to strike two of his prior prison term enhancements, because he successfully petitioned to have them reduced to misdemeanors, and that as such, his prior felony convictions have

³ Although the information lists only one of these case numbers, the probation report indicates defendant was sentenced on these two cases concurrently. Together they represent only one of the four prior prison term enhancements.

become misdemeanors “for all purposes” (§ 1170.18, subd. (k)) and could no longer be used to support a sentencing enhancement for prior felony convictions (§ 667.5, subd. (b)).⁴ The issue was then pending before our Supreme Court. (*People v. Valenzuela* (2016) 244 Cal.App.4th 692, review granted Mar. 30, 2016, S232900.) We concluded that defendant’s contention lacked merit, and we affirmed the judgment in defendant’s appeal. (*People v. Rubio* (Sept. 27, 2016, C080311) [nonpub. opn.].) Defendant petitioned for review of our decision, our Supreme Court granted review, and transferred the case back to us with directions to vacate our decision and reconsider in light of *Buycks*.

DISCUSSION

1.0 Prior Prison Term Enhancements

In *Buycks*, *supra*, 5 Cal.5th 857, the California Supreme Court concluded that “a successful Proposition 47 petitioner may subsequently challenge, under subdivision (k) of section 1170.18, any felony-based enhancement that is based on that previously designated felony, now reduced to misdemeanor, so long as the judgment containing the enhancement was not final when Proposition 47 took effect” (*id.* at p. 879). The *Buycks* court explained:

“[I]n describing the elements required for the imposition of a section 667.5, subdivision (b) enhancement, we have stated it ‘requires proof that the defendant: (1) was previously convicted of a felony; (2) was imprisoned as a result of that conviction; (3) completed that term of imprisonment; and (4) did not remain free for five years of

⁴ Although defendant claimed the underlying convictions for two of his prior prison term enhancements were redesignated as misdemeanors, the record reflects that the two underlying convictions were separate cases, sentenced and served concurrently. That is, they were part of the same prior prison term and represent only one prior prison term enhancement.

both prison custody and the commission of a new offense resulting in a felony conviction.’ [Citation.]

“With this understanding, the resentencing of a prior underlying felony conviction to a misdemeanor conviction negates an element required to support a section 667.5 one-year enhancement. [Fn. omitted.] A successful Proposition 47 petition or application can reach back and reduce a defendant’s previous felony conviction to a misdemeanor conviction because the defendant ‘would have been guilty of a misdemeanor under’ the measure had it ‘been in effect at the time of the offense.’ (§ 1170.18, subs. (a), (f).) Therefore, if the ‘felony conviction that is recalled and resentenced . . . or designated as a misdemeanor’ conviction becomes ‘a misdemeanor for all purposes,’ then it can no longer be said that the defendant ‘was previously convicted of a felony’ [citations], which is a necessary element for imposing the section 667.5, subdivision (b) enhancement. Instead, ‘for all purposes,’ it can only be said that the defendant was previously convicted of a misdemeanor.

“Consequently, section 1170.18, subdivision (k) can negate a previously imposed section 667.5, subdivision (b), enhancement when the underlying felony attached to that enhancement has been reduced to a misdemeanor under the measure.” (*Buycks, supra*, 5 Cal.5th at pp. 889-890.)

However, as the Attorney General notes, under *Buycks*, although relief is available to defendant, he has to file a petition for writ of habeas corpus in the trial court to obtain relief. *Buycks*, concluded the collateral consequences of Proposition 47 could “properly be enforced by means of petition for writ of habeas corpus for those judgments that were not final when Proposition 47 took effect.” (*Id.* at p. 895). Since defendant’s present offense is not eligible for resentencing, *Buycks* contemplated relief by petition for writ of habeas corpus.

2.0 Washout Provision

Defendant contends that since his 2000 prior prison term enhancement must be stricken under *Buycks*, his prior prison term enhancements from 1990 and 1991 must also be stricken under the washout provision of section 667.5, subdivision (b). “[W]hen part of a sentence is stricken on review, on remand for resentencing ‘a full resentencing as to all counts is appropriate, so the trial court can exercise its sentencing discretion in light of the changed circumstances.’ ” (*Buycks, supra*, 5 Cal.5th at p. 893.) This rule is applicable in the Proposition 47 context. (*Buycks*, at pp. 893-894.) If in the habeas proceedings, the trial court strikes defendant’s 2000 prior prison term enhancement, defendant is entitled to a full resentencing. This includes consideration of the applicability of the washout provision to the 1990 and 1991 prior convictions.

DISPOSITION

The judgment is affirmed without prejudice to the filing of a petition for writ of habeas corpus in the trial court on the question of striking defendant’s 2000 prior prison term enhancement and the validity of the 1990 and 1991 prior prison term enhancements in light of the washout provision.

BUTZ, J.

We concur:

BLEASE, Acting P. J.

RENNER, J.